BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

IN THE MATTER of the Petition by NORTHERN TANK LINE, INC., Miles City, Montana, for a Declaratory Ruling as to the Procedure for Dividing a Certificate of Public Convenience and Necessity and the effect of ARM 38.3.2016 on Insurance Coverage.	)	TRANSPORTATION DIVISION DOCKET NO. T-9208

DECLARATORY RULING

1. On January 13, 1988, the Montana Public Service Commission (Commission) received a Petition for a Declaratory Ruling from Northern Tank Line, Inc. (Northern). The issues raised by Northern are as follows:

(a) Whether a carrier's lease of authority to transport a commodity such as asphalt described within a broader term such as petroleum products, while retaining authority to transport other commodities described within such broader terms, is a lease of an "integral segment" of such carrier's authority within the meaning of 69-12-326, MCA?

(b) Whether the Commission may accept a carrier's surrender of its certificate and reissue two certificates to that carrier, each covering part of the authority previously granted in the single certificate, without following the notice and hearing requirements of 69-12-321, MCA, governing applications for certificates, and without applying the standards for decision on such applications set forth in 69-12-323, MCA?

(c) Whether a carrier which leases its authority is required, under ARM 38.3.2016, to carry in its name the insurance on the operations of the lessee carrier.

2. On March 4, 1988, the Commission issued a Notice of Petition. Petitions to intervene were filed by Keller Transport, Inc., H.F. Johnson, Big Z, Inc., Security Armored Express, Inc. and Valtrans, Ltd. A hearing was held on June 28, 1988. Briefs were submitted thereafter by all parties.

3. At the hearing, the Commission took administrative notice of the following:

a. The Commission has previously considered a carrier's lease of authority to transport a commodity such as

asphalt, described in its certificate within a broader term such as "petroleum products," to be a lease of an "integral segment" of such carrier's authority as that term is used in § 69-12-326, MCA.

b. In situations such as described in paragraph 3(a) above, the Commission's past practice has been to accept a carrier's surrender of its certificate and to reissue two certificates to that carrier, each encompassing a part of the authority previously granted in a single certificate, without following the notice and hearing requirements of § 69-12-321, MCA, and without applying the standards set forth in § 69-12-323, MCA.

c. In situations described by paragraphs 3(a) and 3(b) above, the Commission's past practice has been to require that the lessee and lessor file proof of insurance coverage for the respective portion of the authority allotted to each. The Commission has not previously required that a lessor maintain insurance in its own name, on the equipment and operations of its lessee.

d. All files and records of the Commission showing the frequency with which the Commission has divided a certificate, as described in paragraph b above.

e. Any files or records of the Commission containing written interpretations, statements of policy, or orders, regarding the construction of ARM 38.3.2016 -- and specifically whether a lessor must carry insurance on the operations of a certificate lessee.

f. Chapter 107, 1969 Montana Session Laws (Petitioner's Exhibit #1).

g. Montana State Senate, Highways and Transportation Committee, Minutes of meeting held January 28, 1969 (Petitioner's Exhibit #2).

h. Intermountain Tariff Bureau, Inc., Tank Transport Tariff No. 29-A, Items 562 and 545.

4. The first issue presented by Northern requires an interpretation of § 69-12-326, MCA, which provides in pertinent part as follows:

> Lease of certificate. (1) An authorized carrier operating within the state may lease its certificate or any integral segment thereof to another carrier only by approval of the commission. The contract or lease under which the certificate is leased must be in writing and approved by the commission prior to any operation under the certificate.
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> (2) Operation under the certificate is prohibited until approved by the commission in writing. During the period of the

> contract or lease, transportation movements under the contract or lease must be performed by the entity contracting for or leasing the certificate, or any integral segment thereof, while transportation movements by the owner (lessor) are prohibited.

Under this statute, the Commission is charged with determining whether or not "road asphalt" constitutes an "integral segment" of a certificate authorizing transportation of all petroleum and petroleum products. Obviously, interpretation of what constitutes an "integral segment" of a certificate must be on a case-by-case basis.

One consideration is whether or not such a certificate division would duplicate existing authority, contrary to the intent of § 69-12-326(2), MCA. Cf. Stearn v. United States, 87 F.Supp. 596 (W.D. Vir. 1949), CF Tank Lines, Inc., 109 M.C.C. 688 (1971), Nationwide Auto Transporters, Inc., 116 M.C.C. 8 (1971) and Contractors Hauling Service, Inc., 104 M.C.C. 343 (1967). Another consideration is the effect such a certificate division could have on the Commission's ability to fulfill its duty to enforce the Montana Motor Carrier Act. See § 69-12-201, MCA.

The Commission holds that "road asphalt" constitutes an integral segment of a "petroleum and petroleum products" certificate, and therefore, the "road asphalt" portion may be leased pursuant to the provisions of § 69-12-326, MCA. The Commission finds that there are sufficient differences between road asphalt, and other petroleum products, that such a division and lease of authority would not create a duplication of service, nor would it inhibit the Commission from enforcing the Montana Motor Carrier Act. Road asphalts are physically and chemically distinct from other petroleum products (e.g. gasoline, diesel fuel, solvents and other light fuels). Road asphalts must be transported at high temperatures in special insulated containers, unlike most other petroleum products. They also require special handling, are separately tariffed, and exclusively intended for use on road and highway construction projects. Furthermore, the provisions of § 69-12-326(2), MCA, specifically prohibit an owner/lessor from hauling under the leased portion of a certificate.

5. The Petitioner contends that the Commission's practice of division and reissuance of two certificates upon approval of a lease of an integral segment of authority requires compliance with the notice and hearing requirements of § 69-12-321, MCA, and application of the standards for decision set forth in § 69-12-323, MCA. However, the Constitutional and statutory provisions cited by Petitioner are not self-executing. See Kadillak v. The Anaconda Co., 184 Mont. 127, 602 P.2d 147 (1979). In particular, Article II, Sec. 8 of the Montana Constitution provides that:

> The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in

> the operation of the agencies prior to the final decision as may be provided by law. (emphasis added)

Likewise, § 2-4-631(1), MCA, provides:

> (1) When the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply. (emphasis added)

The sections of the Montana Motor Carrier Act which authorize leases of certificates do not contain any provision requiring a public hearing. §§ 69-12-325 and 69-12-326, MCA. The Commission therefore holds that the notice and hearing provisions of § 69-12-321, MCA, and the standards for decision in § 69-12-323, MCA, are not applicable to certificate lease applications brought before the Commission pursuant to § 69-12-326, MCA.

6. Although unnecessary for the decision in this case, the Commission notes that the dormancy principle has no application in Montana, except possibly with respect to Class D Certificates, see In the Matter of the Sale and Transfer of PSC Certificate No. 5298 from Matlack, Inc. to Hampton Enterprises dba Hampton Water Service, Docket No. T-5818, Order No. 4126 (1981), §§ 69-12-323(3) and 69-12-314, MCA; and the issue of public convenience and necessity may not be relitigated in a lease proceeding, see Chabut v. Public Service Commission of West Virginia, 365 S.E.2d 391 (W.V. 1987) and Application of Skjonsby Truck Line, Inc., 357 N.W.2d 227, 232 (N.D. 1984).

7. Intervenors Big Z, Inc., Security Armored Express, Inc. and Valtrans, Ltd., contend that the reenactment doctrine has imputed the force of law to past Commission practice on these matters, citing Hovey v. Department of Revenue, 203 Mont. 27, 659 P.2d 280 (1983). The Commission's conclusions on the above issues renders a decision on the applicability of the reenactment doctrine unnecessary, but we note that unlike Hovey, there is no previous or existing formal administrative rule or agency decision specifically ruling on these issues. And further, the parties have failed to point to any specific date of alleged legislative reenactment (eg. adoption or amendment of § 69-12-326, MCA), or to establish that the legislature was aware of a particular administrative policy on that date (or the grounds for such a presumption). There was no showing whatsoever of any previous formal or informal Commission determination that "road asphalt" constitutes an "integral segment" of "petroleum and petroleum products." In summary, the record before us fails to clearly establish that the reenactment doctrine applies in this case.

8. The last issue involves ARM 38.3.2016 and its application to a lease, division and reissuance situation. The Commission finds that the present wording of the rule is clear,

in that it holds the owner/lessor of a certificate responsible for all acts of its lessee. Commission practice has been to require the lessor to carry insurance only on that portion of the certificate under which it is operating. The lessor has not been required to carry insurance in its own name on the operations of the lessee, and likewise, the lessee has not been required to carry insurance in its name on the operations of the lessor. The Commission finds this practice reasonable. Petitioner contends that perhaps the rule language should be amended to reflect this Commission practice. The Commission agrees that the rule does not specifically embody this practice, and notes that the Petitioner may formally request such an amendment, if it so desires, pursuant to § 2-4-315, MCA, and ARM 38.2.101.

Done and Dated this 27th day of December, 1988 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.